STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 3, 2012
v IDRISS CLINT ROBINSON, Defendant-Appellant.	No. 301605 Oakland Circuit Court LC No. 2010-231564-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DORIAN LAMONT ROBINSON, Defendant-Appellant.	No. 301606 Oakland Circuit Court LC No. 2010-230501-FH

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Defendants appeal as of right their jury trial convictions in this consolidated appeal. In Docket No. 301605, defendant, Idriss Robinson, appeals his convictions of two counts of arson of a dwelling house, MCL 750.72, arson of personal property worth more than $200 but less than $1,000, MCL 750.74(1)(b)(i), and assault and battery, MCL 750.81. The trial court sentenced Idriss to 15 to 60 years' imprisonment for each arson of a dwelling house conviction, 252 days in jail for the arson of personal property conviction, and 93 days in jail for the assault and battery conviction.

In Docket No. 301606, defendant, Dorian Robinson, appeals his convictions of two counts of arson of a dwelling house, MCL 750.72, and arson of personal property worth more than $200 but less than $1,000, MCL 750.74(1)(b)(i). The trial court sentenced Dorian to 15 to 40 years' imprisonment for each arson of a dwelling house conviction, and 353 days in jail for the arson of personal property conviction. For the reasons set forth in this opinion, we affirm the convictions and sentences in both cases.

I. FACTS

These consolidated appeals arise from an incident on November 3, 2009 when two men were observed starting a car fire which spread to two nearby homes. The fire was tied to an earlier incident on November 1, 2009 when defendant Idriss Robinson[1] (hereinafter "Idriss") brought his daughter to the home of Latyra Mathews, with whom he had a prior relationship, to have his daughter's hair braided. When Idriss arrived at Mathews' home, he was greeted by a friend of Mathews, Antoinette Roseborough, who called Idriss a "boy" and stated: "[t]his n**** is here." Mathews initially stated that while she was in another room, Roseborough and Idriss began arguing. When Mathews returned, Roseborough told her that Idriss had smacked her a couple of times, and Mathews observed that Roseborough had a swollen lip. Mathews told Idriss to leave, and Mathews and Roseborough called the police.

Deputy Van Lacken arrived at Mathews' house and while Mathews spoke with Deputy Van Lacken, she received a phone call from Idriss' brother and codefendant, Dorian. Mathews testified that Dorian expressed concern over the incident between his brother and Roseborough, and wanted to know what happened. However, Mathews stated that Dorian did not threaten her or try to scare her. She testified that she told Deputy Van Lacken that she did not witness the alleged assault, but only learned of it through Roseborough, though she also admitted that she did not wish to testify, but stated that a police officer told her he would try to take her kids away if she refused. Mathews also testified that Roseborough's boyfriend, Lamont, asked Mathews and Roseborough for Idriss' address, but both refused to give it to him. Mathews testified further that not giving the information to Lamont led to an argument between Lamont and Roseborough.

At about 7:00 p.m. on November 3, 2009, Officer Jennifer Miles responded to a dispatch call reporting a fire at Mathews' residence. When she arrived, she saw a car fully engulfed in flames in a driveway between two houses. The flames from the car reached the house on the right, and began melting the siding, it is made out of cinder blocks so the bottom part did not burn. However, the fire damaged the vinyl siding on the second story and a second-story window. The flames also reached the upper windows of the house on the left and melted part of a window, an overhang and part of the vinyl siding.

The fire inspector on the scene, Arthur Schrah, as a member of the Michigan Arson Prevention Committee, placed a flier near the scene of the arson offering a reward for information leading to the arrest and conviction of the arsonist. Schrah testified that he did not release any details regarding the fire or how it started, however the fire or sheriff's department did give some information to the media, and a story appeared stating that the fire started on top of a convertible. Schrah also explained that, in general, arsons only occur during the day if the arsonist is trying to send a message or intimidate someone. Additionally, Mathews' car was not insured, so there would not have been a financial motive for starting the fire. According to Schrah, although it was dark outside, the flames from the car illuminated the surrounding area. Additionally, there were lights on inside both of the houses, and a porch light on one of the houses was turned on, that helped to light up the area. According to Schrah's testimony, he met

[1] During trial, Idriss Robinson was often referred to by his nickname of "Mike."

and spoke with Mathews, but she would not cooperate because she feared for her safety and thought that someone was watching her. When told to contact him the next day, Mathews did so, and during that conversation Schrah stated that Mathews informed him that Dorian threatened her a few days earlier. He further testified that Mathews informed him that Dorian stated he did not want to see his brother get in trouble, and that Dorian then visited Mathews' house and offered to pay her $100 if she refused to testify against him. In her trial testimony, Mathews denied any link between the fire and the incident involving Idriss and Roseborough. Mathews also denied telling Schrah that she feared for her safety, that Dorian had threatened her in any manner, or that she was told by Dorian not to contact the police. Mathews testified the reason she did not speak to Schrah the night of the fire was not due to fear, but rather premised on her being upset about her car as well as trying to get her children away from the fire and all of the surrounding commotion.

Testimony revealed that during the night of the fire, Officer Miles met Shannon Nevins, Nicholas Nevins, and Moet Nevins, who lived in the house on the right of Mathews.[2] Nicholas was in fifth grade at the time of the trial, and Moet was in seventh grade. Officer Miles asked the residents if anyone had seen who started the fire. Nicholas and Moet indicated they saw two men start the fire, and that one of the men was an ex-boyfriend of a girl from the house next door. One of them indicated that they thought the men were brothers or family members. Officer Miles returned the next day with two photo-arrays containing six pictures each. One of the photo-arrays contained a picture of Idriss, and the other contained a picture of Dorian. Officer Miles showed Nicholas a photo-array, and he identified Idriss as one of the men that set the car on fire. Nicholas did not identify Dorian from the other photo-array. Moet could not pick either of them out of a photo-array. Officer Miles also had the children write out statements, which Officer Miles signed at the bottom. After questioning the children further, one of them told him that Idriss was one of the men who had started the fire, and Officer Miles added that to the statement. Although the police offered a reward for information leading to the arrest of the individuals that started the fire, the police did not offer the reward until after Officer Miles talked with Nicholas and Moet. Through her investigation, Officer Miles learned that Idriss often visited the house on the left side of the fire.

At trial, Moet testified that, on the night of the fire, through the dining room window of her home, she saw two black men outside near the car that was burned. The men she saw that evening wore white tee shirts under black hooded sweatshirts. She testified further that she knew the name of one of the men, "Mike." She then identified Idriss as one of the men that started the fire. Although she saw one other person with Idriss, she did not see that person in the courtroom at that time. She stated that she did identify the other man at a previous proceeding, but that she did not remember his face anymore because it had been too long.

After a late morning recess, the assistant prosecutor informed the trial court that he intended to recall Moet to the stand to identify Dorian as the other man at the scene of the fire. The assistant prosecutor indicated that Moet told him that, when she initially testified, a

[2] Miles testified that she also met with other neighbors, but they refused to give a statement.

computer screen blocked her view of Dorian. Dorian's defense counsel objected, and argued that it was inappropriate to allow a witness to retake the stand after a recess and after speaking with the assistant prosecutor. The trial court then questioned Moet outside the presence of the jury and ruled that Moet would be allowed to testify over the objections of defense counsel. Moet then retook the stand and identified Dorian as one of the men involved in setting the fire. She testified that she could not see Dorian or the other attorney during her prior testimony because the assistant prosecutor's computer blocked her sight. During cross-examination, she confirmed that she was not able to pick Dorian from a photo-array earlier, and that she did not initially tell Officer Miles that Dorian was there, but insisted that the only reason she did not identify him in court before was because of the computer. Moet also testified that she did not know Dorian's name at the time of the fire, but knew that he was Idriss' brother.

Idriss presented an alibi defense asserting that he was with his uncle and a friend on the night of the fire at a mall visiting a shop owned by a family member. After that, they played cards and Idriss left his residence around 9:30 or 9:45 that evening. Idriss had failed to tell police of being with his uncle, but he did tell them that he was with his sister in Brighton on the night of the fire. Following the evidence presented by the defense, the case was presented to the jury which returned guilty verdicts.

I. DOCKET NO. 301605

Idriss first argues that the prosecution presented insufficient evidence to support his arson convictions.[3] When determining whether sufficient evidence has been presented to sustain a conviction, this Court must "examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). Although this Court reviews the record de novo, *id.*, the standard of review is deferential, and this Court must draw all reasonable inferences in favor of the verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To support a conviction of arson of a dwelling house, the prosecution must prove that: (1) the defendant willfully and maliciously burned a dwelling house; and (2) the defendant intended to burn the dwelling house, or intentionally committed an act that created a very high risk of burning the house, and the defendant knew of that risk and disregarded it. MCL 750.72; see also *People v Barber*, 255 Mich App 288, 294-295; 659 NW2d 674 (2003). Additionally, when a defendant starts a fire that spreads to dwellings, he is guilty of arson of a dwelling house for each separate house that burns, even though the defendant only started a single fire. *Barber*, 255 Mich App at 295.

To support a conviction of arson of personal property worth more than $200 but less than $1,000, the prosecution must prove that: (1) the defendant set property on fire; (2) the property

[3] Idriss never contested that he had committed the assault and battery and does not challenge that conviction on appeal.

burned was personal property; (3) the defendant intentionally set the fire knowing it would damage the personal property; and (4) the property that burned had a fair market value of more than $200 but less than $1,000. MCL 750.74.

Idriss argues that the prosecution did not meet its burden to show that he either started the car fire or assisted Dorian in starting the car fire. As with any crime, identity is an inherent element of these crimes. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Thus, the prosecution must prove that the defendant committed the act that started the fire. *Id*. However, the positive identification of a defendant by witnesses is sufficient to support a conviction of a crime, and "[t]he credibility of identification testimony is a question for the trier of fact that [this Court will] not resolve anew." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The prosecution may meet its burden to prove the defendant's identity by presenting either direct or circumstantial evidence that establishes that element beyond a reasonable doubt. *Nowack*, 462 Mich at 402-403.

As previously stated, Nicholas and Moet Nevins testified that they saw Idriss start the fire. Nicholas was able to identify Idriss from a photo array presented a day after the fire. Additionally, the witnesses indicated that they had seen Idriss on several prior occasions, and Moet was able to identify him by his nickname, "Mike." Although Idriss presented strong impeachment testimony regarding Nicholas and Moet's testimony, this is insufficient to undermine the jury's verdict. The impeachment testimony presented showed that the children's testimony was sometimes inconsistent, that it may have been dark outside on the night of the fire, and that the children may have known about a reward for their testimony. However, the trial court properly held that the children were competent to testify because they understood the difference between the truth and a lie, and promised to tell the truth. Therefore, the impeachment testimony relates to the children's credibility as witnesses. "This Court scrupulously leaves questions of credibility to the trier of fact to resolve . . . ." *Ericksen*, 288 Mich App at 196, citing *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Thus, the trial court properly allowed the jury to resolve these credibility issues and decide whether to believe their testimony. Our review of the record leads us to conclude that when viewed in the light most favorable to the prosecution, there was sufficient evidence to support Idriss' arson convictions.

Idriss next argues that the trial court's two concurrent sentences of 15 to 60 years' imprisonment amount to cruel and unusual punishment. "For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Idriss did not raise this issue in the lower court and, therefore, failed to preserve the issue for appeal.

We review unpreserved issues for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture, the defendant must show that: (1) error occurred; (2) it was plain error; and (3) the error affected the defendant's substantial rights by affecting the outcome of the trial. *Carines*, 460 Mich at 763. Even when the defendant meets this burden, we only reverse where the defendant was actually innocent or the error seriously affected the fairness, integrity, or public reputation of the trial. *Id*. In addition, this Court reviews constitutional issues de novo. *People v Billings*, 283 Mich App 538, 541; 770 NW2d 893 (2009).

The Eighth Amendment[4] to the United States Constitution prohibits cruel and unusual punishment, and the Michigan Constitution prohibits cruel or unusual punishment.[5] A sentence within the minimum statutory guidelines range is presumptively proportionate, and a proportionate sentence is not cruel or unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008); see also *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003) ("If the trial court's sentence is within the appropriate guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence"); MCL 769.34(10). Additionally, the trial court need not consider the defendant's age in sentencing the defendant. *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997).

Idriss' sentences fell within the sentencing guidelines range, and therefore we must presume they are proportionate. Further, Idriss presents no legally recognized reason for this Court to hold that his sentences amounted to cruel or unusual punishment. Although the sentences may result in Idriss spending most of the rest of his life in prison, the trial court did not need to consider this fact. Idriss thus failed to overcome the presumption that his sentences were proportionate to the crimes he committed. As a result, Idriss has not demonstrated plain error affecting his substantial rights, and we affirm his sentences.

II. DOCKET NO. 301606

Dorian first argues that the trial court erred in allowing the fire inspector, Arthur Schrah, to testify regarding prior inconsistent statements that Mathews made to him following the fire. Additionally, Dorian argues that the prosecutor impermissibly suggested to the jury that it could consider Mathews' prior inconsistent statements as substantive evidence.

Dorian properly preserved his challenge to the trial court's decision to allow Schrah to testify regarding Mathews' prior inconsistent statements by objecting at trial. *People v Toma*, 462 Mich 281, 323; 613 NW2d 694 (2000). However, Dorian failed to contemporaneously object to the alleged prosecutorial misconduct or request that the trial court give the jury a curative instruction, and therefore failed to preserve that issue. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

We review for an abuse of discretion a trial court's decision whether to admit or exclude evidence at trial. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *Yost*, 278 Mich App at 353. "A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Meshell*, 265 Mich App 616, 637; 696 NW2d 754 (2005). The decision whether to admit or exclude evidence "frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12

[4] US Const, Am VIII.

[5] Const 1963, art 1, § 16.

(2003). We review such questions of law de novo. *Id*. The trial court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id*.

We review unpreserved issues of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). The defendant bears the burden of showing that the prosecutorial misconduct resulted in a miscarriage of justice. *Id*. This Court will reverse only if it determines that the defendant was actually innocent but the plain error caused him to be convicted, or that the error "seriously affected the fairness, integrity, or public reputation of the judicial proceedings . . . ." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Additionally, this Court cannot overturn a jury's verdict if a curative instruction could have removed any prejudicial effect. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Because we presume that jurors follow their instructions, curative instructions are sufficient to remove the prejudicial effect of most inappropriate prosecutorial statements. *Id*.

Under MRE 613(b), a party may offer extrinsic evidence of a witness's prior inconsistent statement under certain circumstances:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

To satisfy MRE 613(b), "the proponent of the evidence must elicit testimony inconsistent with the prior statement, ask the witness to admit or deny making the first statement, then ask the witness to admit or deny making the later, inconsistent statement, allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness." *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007) (citing MRE 613(b)). The prosecution may impeach its own witnesses, even when the prior inconsistent statement tends to directly inculpate the defendant. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). Under these circumstances, the prior inconsistent statement may not be used as substantive evidence of the defendant's guilt, but only to impeach the witness's testimony. *Id*.

The prosecution, however, may not question and impeach a witness with a prior inconsistent statement that directly inculpates the defendant if that witness offers no relevant testimony other than denying the statement. *Kilbourn*, 454 Mich at 682. Thus, impeachment should not be allowed when "(1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." *Id*. at 683. Dorian argues that the trial court erred in allowing Schrah to testify regarding Mathews' prior inconsistent statement because she did not offer any other relevant testimony, and her credibility was, therefore, not at issue.

Mathews' trial testimony was inconsistent with the statements she purportedly made to Schrah that directly implicated Dorian in the crimes. At trial, Mathews testified that she did not tell Schrah or Deputy Van Lacken that she believed the fire was related to the incident between Idriss and Roseborough. As previously stated, Mathews testified that on the night of the fire she

did not speak to Schrah because of concern for her car and her children. Mathews denied ever telling Schrah that she feared for her safety and felt like someone was watching her or that Dorian told her that "[s]he . . . [h]ad better not contact the police because he was not going to let his brother go back to prison." Mathews acknowledged that Roseborough told her that Dorian offered her $100 not to press charges, but denied hearing Dorian make the offer.

Schrah then retook the stand and testified that Mathews had made inconsistent statements to him immediately following the fire. Schrah's testimony was that on the night of the fire, Mathews told him that she did not want to talk to him because "she was afraid that she was being watched by somebody . . . ." According to Schrah, when he called Mathews the next day, she told him that she was very afraid for her safety and that she had received threatening phone calls from Dorian telling her not to cooperate with the police, he also offered her $100 to not talk to the police. Dorian told Mathews that he did not want to see his brother get in any further trouble. Immediately after Schrah testified about his statements, the trial court instructed the jury regarding the permissible use of prior inconsistent statements. The trial court told the jury that it could use the prior inconsistent statement "for purposes of determining credibility and for no other reason."

Mathews testified that Roseborough's boyfriend, Lamont, appeared after the fire began but before the police and fire department arrived, thereby supporting the defense theory that Lamont started the fire due to his anger at Mathews for not providing the address of the man who struck his girlfriend. Mathews also provided relevant testimony concerning the assault and battery and was present on the evening that her car was burned. Thus, Mathews provided relevant testimony regarding the circumstances surrounding the fire, and the altercation between Idriss and Roseborough. As indicated in *Kilbourn*, " . . . [i]mpeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." *Kilbourn*, 454 Mich at 683. *Kilbourn*, sets forth a "very narrow rule," and we conclude that the rule does not apply in the instant case because the second prong of the test was not met. *Id.* at 463. Mathews provided other testimony for which her credibility was relevant. Accordingly, admitting Mathews' prior inconsistent statements for impeachment purposes was not erroneous.

Dorian also argues that the prosecutor committed misconduct by suggesting to the jury that it should consider the prior inconsistent statements as substantive evidence.

We review claims of prosecutorial misconduct on a case by case basis, and examine the record and the prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). We must review the prosecutor's statements as a whole, and evaluate them in light of the defense's arguments and their relationship to the evidence presented at trial. *Brown*, 279 Mich App at 135. "Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor's misstatement of the facts or the law may deprive a defendant of a fair trial. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). But proper jury instructions cure most errors because jurors are presumed to follow the trial court's instructions. *People v Mesik*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

During closing arguments, the prosecutor stated:

> I will tell you, as it comes to Latyra, I specifically asked her about a conversation she had with Mr. Schrah, and she denied it."
>
> "Did you tell him that you were afraid for your safety?" "No." "Did you tell him that you'd received a phone call from Dorian with a threat that his brother is not going to go back to prison?" "No."
>
> But we do know that a phone call happened that day; she admitted that Dorian called after the assault occurred.
>
> "Did you tell him that after Dorian came over and offered Antoinette a hundred dollars not to press charges?" "No."
>
> "He also told you" - she told him that the police should not be involved because he, Dorian, knows where you live.
>
> Who's lying? Mr. Schrah, who has nothing to do with anything other than being a fire investigator, or Latyra? I don't know why she's lying. It may be because she wants to protect the people now. Maybe she still is in fear; I don't know. But I do know she's lying.
>
> She can't even be straight with you about what happened when she came back with her groceries. She changed her story and add; add story, add story, add story.
>
> She can't even tell you that an assault occurred. How do you not see an assault when somebody, according to her, was continuously calling somebody a boy and using the "n" word in your own home? You're not going to walk out and watch what happens? "I didn't see any of it. Heard it; didn't see any of it." That is not a large house.

The statements summarized Mathews' testimony, and then rehashed Schrah's account of her prior inconsistent statements. The assistant prosecutor also emphasized that Mathews vacillated on certain facts, and could not remember details from the night of the fire. Although the assistant prosecutor repeated Mathews' prior statements, he continued to emphasize to the jury that it should not believe Mathews' testimony, and never stated that it should use the prior statements as substantive evidence. Read in context, the assistant prosecutor was arguing to the jury that Mathews was not being forthright by testifying to all that she knew and that her testimony, when considered in its totality, should be discounted. We cannot glean from the arguments of the assistant prosecutor that he was intentionally trying to argue the prior inconsistent statements as substantive evidence, rather the assistant prosecutor's statements, read as a whole, reiterated his attack on Mathews' credibility. We therefore hold that the prosecutor did not commit misconduct during his closing argument.

Even if we were to presume prosecutorial misconduct, any error arising from the assistant prosecutor's comments were cured by the trial court's instructions. See, *Mesik*, 285 Mich App at

535. As previously stated, the trial court gave an immediate instruction to the jury following Schrah's testimony about Mathews' prior inconsistent statements and following closing arguments, the trial court informed the jury:

> Now in this case, if you believe that a witness previously made a statement which was inconsistent with the testimony of that – that person's testimony at trial, you may only use that statement for certain limited purposes.
>
> And the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court.
>
> The earlier statement isn't evidence, but what the witness said earlier is true [sic].
>
> And I cautioned you earlier about one of the witnesses, Ms. Matthews, who – for prior inconsistent statements. Those inconsistent statements may only be used by you to determine credibility; that is whether or not you believe her. Not for any other reason.

Because the jury is presumed to follow its instructions, and the trial court properly instructed the jury to only consider Mathews' prior inconsistent statements for impeachment purposes, we alternatively hold that the instruction cured any error. *Mesik*, 285 Mich App at 535.

Next, Dorian argues that the trial court erred in allowing Moet to retake the stand and identify him as one of the arsonists. "This Court will not reverse a trial court's decision to admit identification evidence unless it finds the decision clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

In general, MRE 602 allows any witness to testify if the witness has personal knowledge of facts relevant to the case:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

As previously stated, after Moet initially failed to identify Dorian as one of the men that started the fire, the court took a recess. When the court reconvened, the assistant prosecutor requested that the court allow Moet to retake the stand and identify Dorian as one of the arsonists. When the trial court questioned Moet regarding her desire to retake the stand, she testified that she did not see Dorian until she was leaving the courtroom. She stated that a computer screen blocked her line of sight, and she could not see Dorian or his defense attorney. She then stated several times that she recognized Dorian as one of the men who started the fire. She stated that she recognized Dorian, although she did not know his name at the time of the crime, because she had seen him at Mathews' house before. She testified that she was completely sure that she had previously identified Dorian at the preliminary examination, and that nobody told her to retake the stand and identify Dorian. She also stated that the prosecutor did not, in fact, tell or suggest to her whom to identify, although she had previously stated that

she could not remember Dorian's face. Because Moet's testimony constituted sufficient evidence to find that she had personal, first-hand knowledge of Dorian's identity, the trial court did not commit clear error in allowing her to testify.

Dorian analogizes this situation to pretrial identification procedures and argues that the prosecution's interaction with Moet impermissibly suggested to Moet that Dorian was one of the men responsible for the crimes. An unnecessarily suggestive identification procedure may constitute a denial of due process. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). Whether a situation presented an impermissibly suggestive identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure presented a substantial likelihood of misidentification. *Hornsby*, 251 Mich App at 466. Generally, "[t]he need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive." *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Dorian alleges that at trial the assistant prosecutor suggested to Moet that Dorian committed the crimes. However, the record shows that the trial court properly questioned Moet and determined that the assistant prosecutor did not tell her whom to identify. Although Moet initially made a statement that appeared to suggest that the assistant prosecutor told her that she previously identified Dorian at the preliminary examination, the trial court's further questioning showed that this was not truly the case. Moet stated that she independently remembered previously identifying Dorian, and this is bolstered by the fact that Moet first approached the assistant prosecutor to ask to retake the stand. The trial court engaged in extensive questioning of Moet and allowed defense counsel to do the same. Following this lengthy questioning, the trial court concluded that Moet had initiated contact with the assistant prosecutor and had asked him to inquire of the trial court as to whether she could testify once more. Additionally, the trial court noted that Moet had identified Dorian during the preliminary examination as one of the people she saw starting the fire. Evaluated under the totality of the circumstances, we hold that the trial court's finding on this issue was not clearly erroneous.

Dorian finally argues that Schrah improperly gave opinion testimony when he stated that he knew Dorian and Idriss started the fire. Dorian failed to object to the testimony in the lower court, and has, therefore, failed to preserve this issue. *Toma*, 462 Mich at 323. We review unpreserved issues regarding witness testimony for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763. To avoid forfeiture, the defendant must show that: (1) error occurred; (2) it was plain error; and (3) the error affected the defendant's substantial rights by affecting the outcome of the trial. *Carines*, 460 Mich at 763. Even when the defendant meets this burden, this Court only reverses where the defendant was actually innocent or the error seriously affected the fairness, integrity, or public reputation of the trial. *Id*.

"Where a jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury." *Koenig v City of South Haven*, 221 Mich App 711, 726; 562 NW2d 509 (1997), rev'd on other grounds 460 Mich 667 (1999) (quoting *People v Drossart*, 99 Mich App 66, 80; 297 NW2d 863 (1980)). Specifically, a witness may not convey an opinion regarding the defendant's guilt or innocence. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985).

When Dorian's defense counsel cross-examined Schrah regarding his involvement in the investigation, Schrah testified that he knew that Dorian and Idriss started the fire:

> *Q.* You don't know who set this fire, do you?
>
> *A.* Based on - based on my experience? And based on this examination?
>
> *Q.* The question is yes or no; do you know who set this fire?
>
> *A.* I believe that the Defendants set the fire.
>
> *Q.* No, no. I didn't ask you what you believe. Of your own personal knowledge, do you know who set this fire, yes or no?
>
> *A.* Yes, I do. But -
>
> *Q.* So you were there when the fire was set, right?
>
> *A.* No.
>
> *Q.* All right. As a matter of fact, you saw the person when they put the gasoline on the roof of the car and light it [sic] with a match, right?
>
> *A.* No.
>
> *Q.* So of your own personal knowledge, you don't know who set the fire, do you? You weren't there, were you?
>
> *A.* Not when the fire -
>
> *Q.* Excuse me. You weren't there, yes or no?
>
> *A.* No.

Although Schrah's statement amounted to opinion testimony regarding Dorian's guilt, we hold that Dorian waived this issue by inviting Schrah's response. When a party's affirmative conduct directly causes an error, that error is deemed to be "invited error," and the issue is waived. *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). In this case, Dorian's counsel elicited Schrah's statement as a matter of trial strategy. Presumably, he wanted Schrah to testify (which he eventually did) to the fact that he was not present when the fire was started, hence he did not witness either of the defendants start the fire. However, counsel began by asking Schrah if he knew who started the fire. Schrah attempted to clarify Dorian's counsel's question by asking defense counsel if he should answer "based on [his] experience[,]" or "based on this examination[.]" When Dorian's defense counsel responded by simply asking the same question again, Schrah answered bluntly that he believed Dorian and Idriss set the fire.

Although defense counsel did ask for a 'yes' or 'no' answer, Schrah's answer seems a common sense response to the question asked, and defense counsel should have foreseen that the answer may be coming based on Schrah's previous question. At the very least, it was an "invited

response" to an in artfully drafted question. Dorian's defense counsel later induced Schrah to answer in the way he wanted, by asking much more direct questions regarding whether Schrah actually saw the men start the fire. Because this error occurred due to defense counsel's failure to consider and respond to Schrah's question, and because defense counsel could have avoided the issue by asking a more direct and artful question, we hold that defense counsel invited this error.

Dorian has also failed to demonstrate that this error prejudiced him by affecting the outcome of his trial. Our review of the record leads us to conclude that defense counsel elicited testimony that Schrah did not personally see Dorian start the fire. The jury, therefore, knew that the testimony amounted only to Schrah's opinion, and the trial court instructed the jury that it remained the ultimate fact-finder. Additionally, the State presented eye-witness testimony that Dorian started the fire, and presented circumstantial evidence linking Dorian to the fire. Because jurors are presumed to follow their instructions, and the prosecution presented ample evidence to convict Dorian, we hold that this isolated error did not affect the outcome of the trial.

Affirmed as to both cases.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher